IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1970.

No. _____

BOYD L. O'DELL, Petitioner,

vs.

GRACE E. GARRETT, individually and as Executrix of the Estate of JAMES M. McCALLISTER, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO, Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF

THE STATE OF NEW MEXICO.

Counsel for Petitioner
W. PETER McATEE
P. O. Box 568
ALBUQUERQUE, NEW MEXICO 87103

INDEX

Page

Citations to Opinions Below.....2

Jurisdiction.....2,3

Question Presented.....3

Statutes and Regulations Involved.....3

Statement of the Case.....3-6

Reasons for Granting the Writ.....6-9

Conclusion.....9

Appendix "A".....10-14

Appendix "B".....15-26

CITATIONS

Cases:

Free v. Bland, 369 U.S. 663 (1962).....6-8

Yiatchos v. Yiatchos, 376 U.S. 306 (1964).....6

Estate of Curry v. United States, 409 F.2d 671 (CA 6 1969).....7,8

McKee v. Haselbroek. 337 F.2d 310, (CA 10 1964).....7

Silverman v. McGinnes. 259 F.2d 731 (3rd. Cir.).....7

Chandler v. United States, 312 F., Supp. 1236 (D.C. Cal. 1970).....8

In Re Estate of Spitters, 24 Utah 2d 372. 472, P. 2d 426 (1970).....9

In Re Hendrickson's Estate, 156 Neb. 463, 56 N.W.2d 711, cert. den. 346 U.S. 854.....8

In Re Klarfeld's Estate, 237 N.Y.S. 2d 424 (1966).....8,9

Nelson v. Wheeler, 256 P.2d 1080.....8

STATUTES AND REGULATIONS:

31 U.S.C. § 731c(a).....6

31 C.F.R. §§ 315.15; 315.20; 315.35.....6

MISCELLANEOUS:

40 ALR 2d 788 (1955).....7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970.

BOYD L. O'DELL, Petitioner,

vs.

GRACE E. GARRETT, individually and as Executrix of the Estate of JAMES M. McCALLISTER, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New Mexico, entered in the above entitled cause on November 20, 1970, petition for a writ of certiorari to the New Mexico Supreme Court denied, December 23, 1970.

CITATIONS TO OPINIONS BELOW

The District Court of Colfax County rendered judgment dismissing the complaint as to defendants-respondents Grace E. Garrett, individually, and Citizens State Bank of Springer, New Mexico, and granting summary judgment for the remaining defendants, Grace E. Garrett, as Executrix of the Estate of James M. McCallister, deceased, and Velma Bommelaere, without opinion. The Orders and Judgments entered are printed in Appendix B, infra, pp.15-17. The opinion of the New Mexico Court of Appeals, printed in Appendix B, infra, p.17, is reported at _____N.M._____, 478 P.2d 568. The denial of the writ of certiorari by the New Mexico Supreme Court is reported at _____N.M. _____, 478 P.2d 559, and printed in Appendix B, infra, pp.25-26.

JURISDICTION

The order denying a writ of certiorari to review the judgment of the New Mexico

Court of Appeals was entered on December 23, 1970. (Appendix B, infra, pp. 25). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTION PRESENTED

Treasury Regulations prescribe those methods of transfer of United States Savings Bonds which the Treasury Department will recognize and effectuate. The question presented is whether in an action among private parties, compliance with these Regulations is required before an inter vivos gift sufficient to pass title to the bonds and their proceeds can be made by a sole surviving co-owner of the bonds.

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved is 31 U. S. C. § 757c(a). The regulations involved are 31 C. F. R. §§ 315.15; 3151.20; 315.21; 315.35; 315.45.

STATEMENT OF THE CASE

By a letter addressed to the defendant-respondent Citizens State Bank of Springer, New Mexico, James M. McCallister directed

the Bank to allow petitioner access to McCallister's safe deposit box, and directed the Bank to allow petitioner to remove all the United States Series "H" savings bonds from the box. The letter stated the bonds were a gift to petitioner, in appreciation of petitioner's forty-eight years of love and care for McCallister's daughter, Sadie. Sadie O'Dell, was petitioner's wife, and the named co-owner of the savings bonds.

Petitioner never received the bonds, or their proceeds. Access to the safe deposit box was denied by the Bank. The bonds were later withdrawn from the Bank, and endorsed and cashed by James M. McCallister, accompanied by defendants-respondents Grace E. Garrett and Velma Bommelaere.

Petitioner commenced an action for conversion of the bonds, in the District Court of Colfax County, State of New Mexico. Petitioner asserted that the letter resulted in a valid inter vivos gift of the

bonds, and that the actions of the defendant in cashing the bonds and holding the proceeds amounted to conversion.

The transcript of the trial court does not affirmatively show that the Federal question arose at trial. However, the issue was argued by both petitioner and respondents at trial, and in their briefs to the Court of Appeals of the State of New Mexico. Material portions of the petitioner's brief, as appellant below, are as follows:

POINT II

UNITED STATES SAVINGS BONDS CAN BE THE SUBJECT OF A VALID INTER VIVOS GIFT, THUS, THE COURT ERRED IN DISMISSING THE COMPLAINT AS TO GRACE E. GARRETT, INDIVIDUALLY, AND CITIZENS STATE BANK, AND IN GRANTING SUMMARY JUDGMENT AS TO THE REMAINING DEFENDANTS.

Respondents, as appellees below, responded to this point on the merits, heading their response as follows:

POINT II

THESE SERIES H, UNITED STATES SAVINGS BONDS ARE NOT SUBJECT TO BEING TRANS-

FERRED BY INTER VIVOS GIFT, AND THEREFORE, NO GIFT INTER VIVOS WAS CONSUMMATED.

The New Mexico Court of Appeals treated the issue as one properly raised by the parties below, and found the issue to pose the decisive question in the appeal. (478 P.2d at 560, Appendix B, infra, p. 21).

REASONS FOR GRANTING WRIT

Questions involving the relation between State and Federal law and United States Savings Bonds have been before this Court, in Free v. Bland, 369 U. S. 663 (1962) and in Yiatchos v. Yiatchos, 376 U. S. 306 (1964). While language in the Treasury Regulations issued pursuant to Congressional authorization, 31 U. S. C. §731c(a), indicates that savings bonds are payable only to the owners named on the bonds, and are not transferable except as provided in the regulations[1], there is a distinct split

---

[1]See 31 C. F. R. §§315.15; 315.20; 315.35; Appendix B, infra, pp.

among the decisions of the courts which have considered the issue of whether the regulations are effective in litigation involving private parties to preclude valid inter vivos gifts of savings bonds.[2]

In Silverman v. McGinnes, 259 F.2d 731, the Third circuit noted that the purposes of the regulations restricting transferability of savings bonds were preventing the Federal government from being involved in suits among claimants to the bonds, and protecting the interests of the bondholders in thrift securities by preventing unwanted transfers. The court held an inter vivos gift of bonds within the Regulations to be a valid gift, made by one named co-owner to another. In McKee v. Hasselbroek, 337 F.2d 310 (CA 10 1964) the Tenth Circuit indicated that gifts of bonds made as a part of testimentary plans would be recognized and enforced. The Sixth Circuit has held that the Regulations prohibit any form if inter vivos gift not authorized therein, in Estate of Curry v. United States.

---

[2]See, generally, Annotation, 40 ALR 2d 788 (1955).

409 F.2d 671 (CA 6 1969). See Chandler v. United States, 312 F. Supp. 1236 (N.D. Cal. 1970). Both Curry, supra, and Chandler refused to follow Silverman, supra. State courts have also divided on this issue.[3]

This Court recognized in Free v. Bland, supra, that the Treasury Regulations do not insulate purchasers from all claims regarding ownership. In this case, survivorship provisions are not involved, and the proceeds of the bonds have been paid. The United States is not a party, and when the sole owner of the bonds attempts to make an inter vivos gift of the bonds, the policy of protecting bond holders interests by preventing transfers, has no relevance. Under such circumstances, effect should be

---

[3]For cases upholding gifts, see In Re Klarfeld's Estate, 237 N. Y. S. 2d 424 (1963). In Re Hendrickson's Estate, 156 Neb. 463, 56 N. W. 2d 711, cert. den. Kelly v. Rohn. 346 U. S. 854. Contra., see Nelson v. Wheeler, 256 P.2d 1080.

given to donative transfers inter vivos, under applicable State law.[4]

This is an issue of substantial public importance to bond holders, upon which both Federal and state courts have sharply divided. The uncertainty in the law on this issue should receive this Court's attention.

CONCLUSION

For the foregoing reasons, this petition for a writ of certorari should be granted.

Respectfully submitted,

W. Peter McAtee,
Counsel for Petitioner

Dated this March 19, 1971.

[4] In Re Estate of Spitters, 24 Utah 2d 372, 472 P.2d 426 (1970), In Re Klarfeld's Estate, ibid.

APPENDIX "A"

STATUTORY PROVISIONS

31 U. S. C. §757c(2)

The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts subject to the limitation imposed by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe.

31 C. F. R. §315.15 LIMITATION ON TRANSFER OR PLEDGE.

Savings bonds are not transferable and are payable only to the owners named thereon, except as specifically provided in these regulations, and then only in the manner and to the extent so provided.

31 C. F. R. §315.20 GENERAL

(a) No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon presentation and surrender of the bond, but only as specifically provided in this subpart.

31 C. F. R. §315.21 PAYMENT TO JUDGMENT CREDITORS.

(a) CREDITORS. Payment (but not reissue) of a savings bond registered in

single ownership, coownership, or beneficiary form will be made to the purchaser at a sale under a levy or to the officer authorized to levy upon the property of the registered owner or coowner under appropriate process to satisfy a money judgment. Payment will be made to such purchaser or officer only to the extent necessary to satisfy the judgment and will be limited to the redemption value current sixty days after the termination of judicial proceedings.

31 C. F. R. §315.35 PAYMENT OR REDEMPTION.

(a) GENERAL. Payment of a savings bond will be made to the person or persons entitled thereto under the provisions of these regulations upon presentation and surrender of the bond with an appropriate request for payment...

Payment will be made without regard to any notice of adverse claims to a bond and no stoppage or caveat against payment in

accordance with the registration will be entered.

31 C. F. R. §315.45 GENERAL

(a) Reissue of a bond may be made only under the conditions specified in these regulations. Reissue is not authorized solely for the purpose of effecting an exchange as between authorized denominations, but in case of authorized reissue the new bond or bonds may be issued in any authorized denomination or denominations.

31 C. F. R. §315.62 AFTER THE DEATH OF ONE OR BOTH COOWNERS.

If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone (see Subpart

L of this part), except that a request for reissue by him must be supported by proof of death of the other coowner...

APPENDIX "B"

OPINIONS AND JUDGMENTS OF THE COURT BELOW.

STATE OF NEW MEXICO COUNTY OF COLFAX

IN THE DISTRICT COURT

BOYD L. O'DELL,
Plaintiff,

vs. No. 15,854

GRACE E. GARRETT, individually, and as Executrix of the Estate of JAMES M. McCALLISTER, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO,
Defendants.

ORDER OF DISMISSAL

Defendants' motions to dismiss having come on for hearing and good cause appearing therefor,

IT IS HEREBY ORDERED that the Complaint of Plaintiff against Defendants, Grace E. Garrett, individually, and the Citizens State Bank of Springer, New Mexico, be, and it is hereby, dismissed with prejudice.

Joe Angel
District Judge

Filed June 18, 1969.

STATE OF NEW MEXICO COUNTY OF COLFAX

IN THE DISTRICT COURT

BOYD L. O'DELL,

Plaintiff,

vs. No. 15,854

GRACE E. GARRETT, individually, and as Executrix of the Estate of JAMES M. McCALLISTER, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO,

Defendants.

ORDER

This matter having come before the Court on motions to dismiss, filed by all Defendants herein, and the Court having heard arguments, and being otherwise fully advised in the premises, therefore,

IT IS HEREBY ORDERED that:

1. The complaint of Plaintiff against Defendants Grace E. Garrett, individually, and the Citizens State Bank of Springer, New Mexico, be and is hereby dismissed with prejudice.

2. That motions to dismiss defendants, Velma Bommelaere and Grace E. Garrett, as

Executrix of the Estate of James M. McCallister, Deceased, be, and are hereby denied.

Joe Angel
District Judge

Filed June 18, 1969.

STATE OF NEW MEXICO COUNTY OF COLFAX

IN THE DISTRICT COURT

BOYD L. O'DELL,
Plaintiff,

vs. No. 15,854

GRACE E. GARRETT, Executrix of the Estate of James M. McCallister, deceased, and VELMA BOMMELAERE,
Defendants.

SUMMARY JUDGMENTS

THIS MATTER, coming on to be heard before the Court upon the Motion of the Defendants for Summary Judgment, the Court having considered the pleadings herein on file and the depositions taken and filed in this case, and having heard the arguments of counsel, FINDS that there

is no genuine issue as to any material fact and that the Defendants are entitled to a judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Defendants be and they hereby are granted a summary judgment in this action and the Complaint of Plaintiff herein against the Defendants be, and the same hereby is, dismissed with prejudice.

Joe Angel
District Judge

Filed December 1, 1969.

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BOYD L. O'DELL,
Plaintiff-Appellant

vs. No. 557

GRACE E. GARRETT, individually and as Executrix of the Estate of JAMES M. McCALLISTER, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO,
Defendants-Appellees.

(November 20, 1970)

APPEAL FROM THE DISTRICT COURT
OF COLFAX COUNTY

OPINION

SPIESS, C. J.

This action was brought by Boyd L. O'Dell, appellant, in conversion against Grace E. Garrett, individually, and as Executrix of the Estate of James M. McCallister, deceased, Velma Bommelaere, and Citizens State Bank of Springer, New Mexico.

Involved were a number of United States Savings Bonds, Series "H", which appellant claimed to own as a result of a gift (inter vivos) made to him by James M. McCallister during his lifetime, and which allegedly were converted by defendants (appellees).

The trial court entered orders dismissing the Complaint, with prejudice, against Grace E. Garrett, individually, and the Citizens State Bank of Springer, and later it entered summary judgment in favor of Grace E. Garrett as Executrix of the Estate of James M. McCallister, Deceased, and Velma Bommelaere. The appeal is from the orders of dismissal

and the summary judgment. We affirm.

Relevant and undisputed facts disclose that appellant received a letter from James M. McCallister, signed by him and addressed to the Citizens State Bank of Springer, New Mexico. Material portions of the letter are:

> "Please open my safety deposit box No. 33 for which the bearer, Boyd O'Dell, has the key, and in the presence of an officer of your bank, assist him to remove the "H" Bonds that are in the names of J. M. McCallister or Sadie M. O'Dell.
>
> "These bonds are a gift to Boyd O'Dell in appreciation of his forty-eight years of love and care of my daughter, Sadie."

Appellant delivered the letter to an officer of the bank and requested that he be permitted access to the safety deposit box for the purpose of removing the bonds. The request was denied by the bank and the bonds remained in the box. Thereafter, James M. McCallister, accompanied by appellees Velma Bommelaere and Grace E. Garrett withdrew the bonds, cashed them and deposited proceeds to bank accounts

in the names of James M. McCallister or Mrs. Grace Garrett. It is appellant's position:

> "...that a valid inter vivos gift of the Series H United States savings bonds had been made by J. M. McCallister, deceased, and thereafter any interference of any nature with the bonds and with appellant's possession and/or use of the bonds would have been wrongful as against the Plaintiff and would have amounted to conversion of personal property."

A number of issues were presented. However, the decisive question is whether these United States Savings Bonds could be the subject of a gift inter vivos.

Bonds of the kind involved were issued pursuant to Congressional authority. 31 U. S. C. §757c(c) authorizes the Secretary of the Treasury to issue such bonds. 31 U. S. C. §757c(a) provides:

> "The various issues and series of the savings bonds and the savings certificates shall be in such forms, shall be offered in such amounts, subject to the limitation imposed

> by section 757b of this title, and shall be issued in such manner and subject to such terms and conditions consistent with subsections (b)-(d) of this section and including any restrictions on their transfer, as the Secretary of the Treasury may from time to time prescribe."

The Treasury Regulations provide that bonds cannot be transferred but can be surrendered and re-issued. Estate of Curry v. United States, 409 F.2d 671 (6th cir. 1969). See regulations appearing as an appendix to the opinion in Estate of Curry. Further, 31 C. F. R. §315.15, provides, in part:

> "Savings bonds are not transferable and are payable only to the owners named thereon except as specifically provided in these regulations, and then only in the manner and to the extent so provided."

These regulations are accorded the force of law. Yiatchos v. Yiatchos, 376 U. S. 306, 11 L.Ed.2d 724, 84 S.Ct. 742 (1964).

It is our conslusion that the bonds of the kind involved could not be the subject

of a gift inter vivos. This conclusion, in our view, is supported by the weight of authority: c.f. Annot. 40 A. L. R. 2d 788 (1955).

In Estate of Curry v. United States, supra, the court, in considering a claimed gift inter vivos of United States savings bonds, which were of a kind subject to the same regulations as those involved here, said:

> "In passing upon the question of whether title to these bonds could be transferred by manual delivery to the donee as a gift inter vivos, without surrender of the bonds and reissuance in the sole name of the donee, it is of controlling importance to determine the nature of the ownership created in Series E Bonds and whether Federal or State law controls. In 1953 this Court held in Guldager v. United States, 204 F.2d 487 (6th Cir.) that an estate created by Series E. bonds registered in a co-ownership form did not come into existence under the law of the State where the owners resided but was created by federal contract and controlled by federal law."

In conclusion, the Court further said:

> "We reaffirm the holding of this Court in Guldager v. United States, supra, 204 F.2d 487, that an estate created in Series E bonds is a matter of contract between the United States and the purchaser of the bonds. The bonds are non-transferable. A valid gift inter vivos cannot be accomplished by manual delivery to a donee unless the bonds also are surrendered and reissued in the name of the donee in accordance with the Treasury Regulations..."

In concluding that the bonds could not be the subject of a gift inter vivos, we have not overlooked cases which have upheld such gifts notwithstanding the prohibition against transfer. See Annot. 40 A. L. R. 2d 788 (1955).

It follows that since neither title, nor right to possession of the bonds were in appellant, his action in conversion was not maintainable. Wray v. Pennington, 62 N.M. 203, 307 P.2d 536 (1957).

The action of the trial court in entering the orders of dismissal and the summary judgment is affirmed.

IT IS SO ORDERED.

s/ WALDO SPIESS
Chief Judge, Court of Appeals

WE CONCUR:

s/ LaFEL E. OMAN J.

s/ JOE W. WOOD J.

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO
(Wednesday, December 23, 1970)

No. 9177

BOYD L. O'DELL,

Petitioner,

vs. Original Proceeding in Certiorari

GRACE E. GARRETT, Individually, and as Executrix of the Estate of James M. McCallister, Deceased, and VELMA BOMMELAERE, and CITIZENS STATE BANK OF SPRINGER, NEW MEXICO,

Respondents.

This cause coming on before the Court for condiseration on petition for writ of certiorari directed to the Court of Appeals

of the State of New Mexico, and the Court having considered said petition and being sufficiently advised in the premises;

IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 557 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico